Monarch Marking Systems, Inc. *and* General Truck Drivers, Chauffeurs, Warehousemen and Helpers Local Union No. 957, an affiliate of the International Brotherhood of Teamsters, AFL–CIO. Case 9–CA–34406

June 30, 1998

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

On July 9, 1997, Administrative Law Judge James L. Rose issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We disavow the judge's finding that the August 1996 suspension of William Stamm by the Respondent was ''suspect.'' There was no allegation in the complaint that the August suspension was violated of the Act, nor was there was any evidence of any union activity during the period leading up to the suspension. In light of this, we also find it unnecessary to pass on the judge's rationale in making this finding.

[2] In adopting the judge's conclusion that the Respondent violated Sec. 8(a) (3) and (1) of the Act by suspending Stamm on November 14, 1996, we rely solely on his credibility-based determination that Stamm was at work repairing Jennifer Lynn Miller's machine during the incident at issue. Accordingly, we find it unnecessary to rely on the judge's drawing an adverse inference from the Respondent's failure to produce its production records for that period. Based on our adoption of the finding that the November suspension was unlawful, we further find the November 19, 1996 discharge unlawful, because the suspension led directly to the discharge under the Respondent's progressive disciplinary procedure.

Additionally, Member Brame disavows the judge's statement that the conduct allegedly engaged in by Stamm was a ''trivial matter'' for which to discipline and discharge a long-term employee. This statement amounts to the judge's substitution of his own judgment for the Company's business judgment with respect to the penalties to be imposed for misconduct. In Member Brame's view, the Board should resist the temptation to become a personnel department and interject itself into an employer's managerial functions and decision-making. See *Bridgeport & Port Jefferson Steamboat Co*., 313 NLRB 542, 545 (1993); and *Super Tire Stores*, 236 NLRB 877 fn. 1 (1978).

In adopting the judge's dismissal of the allegation concerning Timothy Sams, which was not excepted to by the parties, we note that the judge incorrectly stated that the General Counsel argued that Sams was a supervisor.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Monarch Marking Systems, Inc., Miamisburg, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(d).

''(d) Within 14 days after service by the Region, post at its Miamisburg, Ohio facility copies of the attached notice marked 'Appendix.'[3] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 15, 1996.''

Julius U. Emetu, II, Esq., for the General Counsel.
Timothy P. Reilly, Esq., of Cincinnati, Ohio, for the Respondent.
Keith Jones, of Dayton, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me at Cincinnati, Ohio, on April 14, 1997, on the General Counsel's complaint which alleged that the Respondent discharged William R. Stamm in violation of Section 8(a)(3) of the National Labor Relations Act. The Respondent is also alleged to have made certain statements to employees violative of Section 8(a)(1) of the Act.

The Respondent generally denied that it committed any unfair labor practices and affirmatively contends that Stamm was discharged for cause.

On the record as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is engaged in the manufacture of marking labels at its facility in Miamisburg, Ohio. In the conduct of this business, the Respondent annually sells and ships to points outside the State of Ohio goods valued in excess of $50,000. The Respondent admits, and I find, that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

General Truck Drivers, Chauffeurs, Warehousemen and Helpers, Local Union No. 957, an affiliate of the International Brotherhood of Teamsters, AFL-CIO (the Union) is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

Although the Respondent has about 1200 employees, the events giving rise to this complaint took place on the second shift (3 to 11 p.m.) in the conventional department (IPS). There were about 30 employees on the second shift, including about 6 slitter operators, 2 group leaders, and William R. Stamm, the senior machine adjuster. The supervisor was Joseph Cashman.

In August 1996[1] the Union began an organizational campaign among the Respondent's employees. There were meetings, employees wore union buttons, and literature and authorization cards were distributed.

Stamm had worked for the Respondent nearly 31 years, during which time he had never been given any kind of disciplinary action. His job was to perform quick fix repair of machines which had malfunctioned, make setups, and perform related functions. He was to keep the downtime to a minimum; however, if he could not fix a machine in about 30 minutes then he was to report it to the machine repair department and the operator would be assigned another machine.

In August Stamm received a 3-day suspension because, according to Cashman, certain operators had complained about Stamm. Specifically, Cashman testified that he had received complaints that Stamm was not appropriately attentive in responding to requests that down machines be fixed. He was also accused of harassing certain of the operators.

Following this suspension, Stamm took a short leave of absence and returned to work in early September. He testified that when he returned to work Cashman told him there was a union drive going on and ''we know you are pronion.'' Stamm told Cashman that he was unaware of any union activity and in fact did not know of any. However, he later became active, wearing a button, passing out cards and literature, and attending meetings.

On November 14, Stamm was again accused of not performing his job by ignoring requests to fix machines. Cashman testified that he observed Stamm sitting at the machine of Jennifer Miller, when lights were on indicating the necessity to repair other machines. Cashman checked with a group leader, and determined that Stamm should be suspended. A second suspension in a year would mean termination pursuant to company policy, and Cashman so recommended to John Hartwell, his immediate superior. Since Stamm had been employed more than 10 years, his termination was finally passed on by the company president, and was finalized on November 19.

[1] All dates hereafter are in 1996 unless otherwise indiciated.

B. *Analysis and Concluding Findings*

1. The Alleged 8(a)(1) Violations

a. *Disparate enforcement of the no-solicitation/no-distribution rule*

Stamm testified that in September he laid a union magazine he had been given on a picnic table in the area where IPS department employees eat their lunch. Several employees were eating and Cashman joined them. Cashman picked up the magazine, leafed through it, and put it down. According to Stamm, when the buzzer sounded for them to return to work, Cashman said, ''Is this yours and I said nope. He said can I have it and I said Joe you can't take something that doesn't belong to you. He stood out in the hall and he was looking at it and he said can I have it. It's not mine and he took it to the office with him.''

The Respondent's information guide sets forth a rule which prohibits ''distribution of literature in working areas'' at any time. The general validity of this rule is not contested by the General Counsel. However, because employees have sold sandwiches, cookies, jewelry, dolls, and Avon products and have distributed literature relating to these items, Cashman's act is alleged to have been disparate enforcement of an otherwise valid rule.

In effect the General Counsel contends that when union literature is distributed on an employer's premises at permissible places, agents of the employer violate the Act if they look at or take the literature. counsel for the General Counsel has cited no authority for such a proposition. The cases cited, holding unlawful disparate enforcement of valid no-solicitation/no- distribution rules, do not consider a fact situation similar to the one here.

Cashman asked if he could have the magazine and Stamm said only that it was not his, and that Cashman should not take what did not belong to him. But there was no prohibition by Cashman on leaving the magazine or other union literature on the picnic table. On these facts I conclude there was no attempt to enforce, disparately or otherwise, a no-distribution rule. I shall recommend that paragraph 5(c) of the complaint be dismissed.

b. *Coercion of employee for wearing a union badge*

John Hart, a third shift employee (11 p.m. to 7 a.m.) testified that in November just before his shift was to start, he saw Cashman who said, referring to the two union buttons Hart was wearing, ''I thought you were smarter than that.'' By this statement, Cashman is alleged to have violated Section 8(a)(1) of the Act. I conclude he did not.

Counsel for the General Counsel cited *Highland Yarn Mills*, 313 NLRB 193 (1993), in which the judge found illegal interference with union activities where a supervisor called an employee ''a loser'' in front of the employee's girlfriend ''insisting that he had no hope of victory because the Union was going out and that the solicitors already had enough cards to eliminate the Union.'' Id. at 207. However, this statement was accompanied by the threat that when the union was voted out, the company was going to fire some people.

The statement of Cashman neither contained a threat, express or implied, nor was it a uttered in the context of a threat. Standing alone, as it does, this statement is protected

by Section 8(c) of the Act and cannot be the basis of an unfair labor practice finding. E.g., *Central Broadcast Co*., 280 NLRB 501 (1986) (supervisor giving employees his negative views on unionism lawful); *Harper Packing Co.*, 310 NLRB 468 (1993) (supervisor telling employees that he hated unions lawful). Accordingly, I shall recommend that paragraph 5(c) be dismissed.

c. *Threat for wearing a union badge*

Timothy Sams has been a group leader on the first shift since January 1997, prior to which he was group leader on the third shift. At that time his supervisor was Mel Knight. Although there is minimal evidence concerning the supervisory status of group leaders, counsel for the General Counsel argues that Sams was a supervisor. Sams testified that he gave employees orders and filled in for Knight when he was on vacation. The Respondent does not contest the assertion that Sams was a supervisor, and I conclude there is no basis to find other than during the material time he was.

Paragraph 5(d) of the complaint alleges that in December, Knight threatened Sams with the loss of his ''supervisory position'' because he wore a union button. Sams testified that Knight and another supervisor approached him, and Knight twice tapped him on the shoulder and asked why he was wearing the union button. Sams testified:

> Knight then took a piece of paper and he wrote down different positions starting from the president of the company down to my position and he told me that the last position was group leader. He circled that position and said this is where you're at, this is where you could go. Well, my response to that was I'm happy were I'm at. I have no desire to go any further.
>
> Q. And, what did he say?
>
> A. He said well, in your position it doesn't look good you wearing a Union badge.
>
> Q. What else did he say?
>
> A. He said you do whatever you want to do. I can't tell you what to do but just in your position it just doesn't look good.

Sams testified that he took the button off, and shortly thereafter was transferred to the first shift, for which he had applied some 2 years' previously. On these facts, the General Counsel argues that the Respondent threatened an employee that he would lose his ''supervisory position'' because he engaged in protected activity.

Aside from whether there was any kind of a threat in Knight's statement, which is doubtful, since Sams was a supervisor, Knight was correct. Sams should not have been wearing a union button. Indeed, as a general matter, supervisors can be disciplined for engaging in union activity. *Parker-Robb Chevrolet, Inc*., 262 NLRB 402 (1982), affd. sub nom. *Automobile Salesmen Local 1095 v. NLRB*, 711 F.2d 888 (D.C. Cir. 1988). Accordingly, I conclude that the Respondent did not violate the Act by Knight's statement to Sams and I will recommend that paragraph 5(d) be dismissed.

2. The Discharge of William Stamm

In October 1995, Joseph Cashman first became a supervisor, though at the time he had worked for the Respondent more than 28 years. Cashman testified that early in his tenure as a supervisor he had complaints from machine operators about Stamm not being sufficiently attentive in fixing their machines when down. Cashman asked Vicki Thomas, a former supervisor in that department, for suggestions. Thomas offered a procedure she had used. If the adjuster worked on a machine for 15 minutes without success, the operator would be instructed to go to another machine, and if after another 15 minutes the machine still could not be fixed, then the adjuster was instructed to turn the machine over to machine repair. Cashman and Stamm agreed that Stamm would abide by such a procedure, and apparently he did so.

Cashman testified that in August he received some complaints from machine operators about Stamm ignoring their requests for repairs and that he was ''harassing'' them. Though Stamm denied doing anything wrong, he nevertheless apologized. He was given a 3-day suspension and then took the rest of the month off as a leave of absence.

Though Stamm was unaware of any union activity when he was suspended, upon his return to work he became a leading supporter of the organizing effort. He also was a leader among employees, having been elected by them to be the employee spokesman at company meetings held to improve communications between management and employees. This was referred to in the record as PPI, but no other details were proffered.

On November 14, Stamm was called to fix the machine of Jennifer Miller. While working on her machine, Miller confided to him some personal problems she was having. Miller testified that Stamm sat on the edge of her chair and made adjustments to the machine as she operated it. However, he was unable to get it fixed when group leader Mary Jane Gibson approached telling him that another machine needed attention. Stamm told Miller he would return after the PPI meeting, then scheduled for 5 p.m.

Cashman testified that he observed Stamm sitting on a chair at Miller's machine taking with her. He testified that he ''never saw him doing anything. So, I saw him sitting there for approximate ten or fifteen minutes.'' He then approached Stamm, and asked if he was working on Miller's machine. According to Cashman, Stamm said he wasn't. Cashman then said there were lights on (indicating machines were in need of repair) and Stamm said he would get right to them.

Cashman testified that he talked to Gibson and then Hartwell, who instructed Cashman to send Stamm home, and they would take the situation under advisement. Stamm was thus given a 3-day suspension and, according to Cashman, since this was the second suspension within 12 months, he recommended Stamm be discharged, pursuant to the policy set forth in the Respondent's information guide.

In effect, Stamm was discharged because, according to Cashman, he was observed talking to a machine operator for about 15 minutes when he should have been fixing machines. I do not believe Cashman. I conclude that Cashman's asserted reason for suspending Stamm was a pretext. This is a very trivial matter for which to suspend and then discharge an employee of nearly 31 years. Further, Cashman made no

effort to determine whether what he claims to have observed was indeed true. He did not interview Miller. If Stamm's actual job performance was the real issue, experience in these matters suggests that Cashman would have attempted to get the facts—from Miller and/or from Stamm. I simply do not credit Cashman's contention that when he asked Stamm if he had been working, Stamm said no. Rather, I credit Stamm's version—that he told Cashman they were continuing to have problems with Miller's machine.

In the Written Reprimand of November 19, the rule violations cited by Cashman are ''Pg. F/4, Level III, Rule 6 & 9.'' Level III sets forth ''examples of misconduct for which a disciplinary suspension or disimissal will be issued.'' Rule 6 is: ''Deliberate refusal to follow work-related directions given by your supervisor.'' Cashman could not state any particular order he gave Stamm which Stamm refused to follow on November 14, or any other time. His testimony about this purported violation was general, and vague—that Stamm did not repair machines sequentially. Rule 9 is: ''Threatening damage to plant or facilities.'' Cashman admitted that Stamm did not engage in any such acts; however, he testified that in the information guide he was using rules 9 and 10 were ''flip flopped'' and that Stamm was guilty of ''Engaging in harassment.''

The explanation that the two rules were reversed is simply not credible, nor was Cashman's testimony supported by others or any documentary evidence. Further, there is no evidence even that Stamm ''harassed'' anyone on November 14. Indeed, Cashman admitted that there was no such occurrence on November 14—that the harassment had happened earlier, presumably in July or August, for which Stamm received the first suspension. In short, I conclude that the written reprimand, which served as the basis for the discharge, was an after-the-fact attempt by Cashman to bolster his decision. The written reasons given by Cashman are not consistent with his testimony and have no basis in fact.

In addition to his long tenure, Stamm was recognized as an outstanding employee. In the record are four commendations, the most recent of which was a November 6 memo from Hartwell giving ''thanks to Bill Stamm for his efforts.''

Miller credibly testified, without contradiction, that she was required to fill out a daily form showing her production and machine downtime. In order to verify or disprove the Respondent's contention that Stamm had not been doing his job on November 14 counsel for the General Counsel caused to be issued a subpoena for these records. The Respondent claimed at the hearing that such records no longer exist—that the records for 1996 have been destroyed. While there is no basis to discredit the representation of ounsel for the Respondent in this regard, I do not credit Cashman's assertion that the records were no longer kept after June or August. The destruction of clearly material evidence shortly after the charge was filed herein leads me to conclude that these records would have been adverse to the Respondent's interest. I infer that it is more probable than not that production records for November 14 would have tended to establish that Stamm was not derelict in his work.

I credit Stamm that shortly after returning to work in September, Cashman said to him, ''Bill, there's a Union drive going on. He said we know you're pro-Union and there will be no Union activities during working hours.'' Stamm told Cashman that he was unaware of the union campaign at that time, though he later became involved. I discredit any testimony of Cashman tending to deny this testimony of Stamm.

That Cashman would consider Stamm a leader in the organizational campaign is consistent with Stamm's leadership among employees. As noted, he was a very long term employee and had been elected by fellow employees as their spokesman at the PPI meetings.

Finally, I conclude that the August suspension of Stamm is suspect. Cashman testified he had statement from several machine operators who maintained that Stamm was not properly doing his job. But when Cashman confronted Stamm he refused to show these to Stamm, or to consider Stamm's version of such events as may have been in these statements. One such employee, Priscilla Woods, testified that she had had a lot of problems with Stamm ''through the years.'' Such is a clear exaggeration and is incredible, given Stamm's long and meritorious tenure.

I conclude that Cashman's act (and those of his superiors adopting his recommendation) was a pretext; and I infer that the true motive for the suspension and discharge of Stamm was to ''chill'' the union activity among employees. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966); *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983). Accordingly, I conclude that the Respondent violated Section 8(a)(3) of the Act by suspending and discharging Stamm and I shall recommend an appropriate remedy.

IV. REMEDY

Having concluded that the Respondent committed an unfair labor practice, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act, including reinstating William R. Stamm to his former job, or if that job no longer exists, to a substantially identical position of employment and make him whole for any loss of wages or other benefits he may have suffered in accordance with the formula set forth in *F. W. Woolworth Co*., 90 NLRB 289 (1950); and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact, conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Monarch Marking Systems, Inc., Miamisburg, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees because of their activity on behalf of General Truck Drivers, Chauffeurs, Warehousemen and Helpers Local Union No. 957, affiliated with the International Brotherhood of Teamsters, AFL–CIO.

(b) In any like or related manner, interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer William R. Stamm immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed its facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since the date of this Order.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

(f) Those allegations of the complaint not specifically found unfair labor practices are dismissed.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against employees because of their activity on behalf of General Truck Drivers, Chauffeurs, Warehousemen and Helpers Local Union No. 957, an affiliate of the International Brotherhood of Teamsters, AFL–CIO.

WE WILL, within 14 days from the date of this notice, remove from our files any reference to the unlawful discharge and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer William R. Stamm immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position of employment and WE WILL make him whole for any loss of wages or other benefits he may have suffered as a result of our discrimination against him, with interest.

MONARCH MARKING SYSTEMS, INC.